152 U.S. 611

RECORD, CASE No. 14,377.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~947~~. 143 327

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGIANNA C. BOOTH, ADMINISTRATRIX OF THE ESTATE OF FRED. D. BOOTH, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 23, 1890.

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1 SCHEDULE "A."

UNITED STATES OF AMERICA:

GEORGIANNA C. BOOTH, as Administratrix of the Etate of Fred. D. Booth, Deceased, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota, of the June term, A. D. 1890, of said court, held in the city of St. Paul, in said district, in the year of 1890.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 3rd day of May, A. D. 1889, came the plaintiff above named, by her attorney, and filed in the clerk's office of said court her return from Stearns county district court in the words and figures as follows, to wit:

2 STATE OF MINNESOTA,
County of Stearns.

In District Court.

GEORGIANNA C. BOOTH, as Administratrix of the Estate of Fred. D. Booth, Deceased, Pl'ff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Def't.
Complaint.

The above-named plaintiff alleges and shows to the court that on the 21st day of July, 1888, the above-named Fred. D. Booth died intestate, leaving as his only heirs-at-law his mother, Georgianna C. Booth, administratrix above named and plaintiff herein, and Harvey D. Booth, a brother, also a son of said Georgianna C. Booth.

That said Fred. D. Booth was at the time of his decease a resident of said Stearns county.

That thereafter, to wit, on the 2nd day of October, 1888, petition was made to the probate court of said Stearns county for the appointment of this plaintiff as administratrix of the estate of said Fred. D. Booth.

That due notice of a hearing thereon was given by said court and a hearing thereof had at a special term of said court on the 9th day of November, 1888; that at said hearing this plaintiff
3 was by said court duly appointed administratrix of said estate; that thereafter she duly qualified as such administratrix, and letters of administration upon said estate were to her duly granted by said probate court.

That the Northern Pacific Railroad Company, defendant herein, is now and for more than one years last past has been a corporation

duly organized, created, and existing under and by virtue of the laws of the United States of America.

That defendant now is and for more than one year last past has been the owner of and operating a line of railway between Brainard, in Minnesota, and Fargo, in Dakota Territory.

That plaintiff's intestate was employed on said line of railway by defendant as a brakeman.

That at the village of Glyndon, in the State of Minnesota, on said line of railway, on or about the 20th day of July, 1888, said Fred. D. Booth, while in the performance of his duty as brakeman, in coupling the air hose on two of the cars of defendant, was knocked down, run over, crushed, and mangled by one of said cars in a horrible manner, resulting in his death in a few hours thereafter.

That the accident aforesaid to said Booth was caused by his foot becoming fast in the frog of one of the switches on said road at said place.

4 That defendant had neglected to comply with chapter sixteen (16) of General Laws of 1887 of this State, in not properly filling, adjusting, and blocking the frog aforesaid, so as to prevent the foot of employees becoming fast therein.

That, while an attempt had been made to block the frog aforesaid, the work had been done in such a negligent, careless, and incompetent manner as to leave said frog in a thoroughly dangerous condition, and plaintiff avers and believes that the imperfect blocking of said frog was wholly responsible for the death of said Fred. D. Booth.

That said Booth was at the time of his death a young, able-bodied man of twenty-three years of age, skilful and trustworthy in his business and capable of earning from seventy-five to one hundred dollars per month.

That he was the principal support and stay of his mother, said Georgianna C. Booth.

That by reason of his death as aforesaid his heirs, named herein, have been damaged by said defendant in the full sum of five thousand dollars.

Wherefore plaintiff asks judgment against said defendant for the sum of five thousand dollars and for her costs and disbursements herein.

Dated St. Cloud, November 22nd, 1888.

J. D. SULLIVAN,
Attorney for Plaintiff.

5 STATE OF MINNESOTA, } *ss:*
County of Stearns, }

J. D. Sullivan, of said county, being duly sworn, says he is the attorney of the plaintiff in this action; that the plaintiff is absent from the county of Stearns, where this deponent resides, and that the foregoing complaint is true to the best of deponent's knowledge, information, and belief.

J. D. SULLIVAN.

Subscribed and sworn to before me this 22nd day of November, 1888.

[Notarial Seal Stearns Co., Minn.]

L. A. EVANS,
Notary Public, Minn.

6 STATE OF MINNESOTA, }
County of Ramsey. }

District Court.

GEORGIANNA C. BOOTH, as Administratrix of the Estate of Fred. D. Booth, Deceased, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Answer.

For answer to the complaint herein said defendant admits that it is a corporation and the owner and operator of a railroad substantially as alleged in said complaint; that at the time therein mentioned and for some time prior thereto said Fred. D. Booth was in said defendant's employ, and that said Fred. D. Booth was killed on said defendant's railroad at Glyndon, Minnesota, on July 20th, 1888.

Further answering, said defendant denies each and every allegation in said complaint contained, save as hereinbefore expressly admitted, and specifically denies that by reason of any of the matters or things therein set forth said plaintiff or the heirs of said Fred. D. Booth or any or either of them have been damaged in the sum of five thousand dollars or any other sum.

For a further defense said defendant alleges that the death of said Fred. D. Booth was caused solely by his own negligence and not by the negligence of defendant or any of its servants.

Wherefor- said defendant prays to be hence dismissed with its costs and disbursements in this action.

Dated this 10th day of December, A. D. 1888.

JNO. C. BULLITT, JR.,
Attorney for Defendant.

7 STATE OF MINNESOTA, } *ss:*
County of Ramsey, }

John C. Bullitt, Jr., came before me personally, and, being duly sworn, doth say that he is an officer, to wit, ass't counsel of defendant, in the above-entitled action; that the foregoing answer is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters that he believes it to be true.

JNO. C. BULLITT, JR.

Subscribed and sworn to before me this 10th day of December, A. D. 1888.

P. P. STARRIN,
Notary Public, Ramsey Co., Minn.

[NOTARIAL SEAL.]

STATE OF MINNESOTA, }
County of Stearns. }

District Court.

GEORGIANNA C. BOOTH, as Administratrix of the Estate of Fred. D. Booth, Pl'ff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Def't.

The defendant in the above-entitled action having by its petition in said action suly applied to the court for a transmission of said cause to the circuit court of the United States, and the bond required by law having been duly made and filed and approved—

It is now offered that the said district court proceed no further in said cause, and that the said action be, and the same is hereby,
8 transmitted to the circuit court of the United States for such further proceedings therein as said court may be advised.

Dated Dec. 12, 1888.

By the court:

D. B. SEARLE, *Judge.*

STATE OF MINNESOTA, }
County of Stearns, } *ss:*

District Court.

Petition for Removal to United States Court.

To the honorable the court aforesaid:

The Northern Pacific Railroad Company, the defendant in the above-entitled action, respectfully shows *it* that it is a corporation organized and existing under the laws of the United States of America, to wit, that certain act of Congress approved Jun'y 2, A. D. 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," and the several subsequent acts and joint resolutions of Congress relating to the same subject and matter; that the above-entitled action has been commenced and it is yet pending in this court; that the date of the commencement of said action was November 23rd, 1888, and the same has not yet been tried; that the amount in controversy in said suit exceeds the sum of two thousand dollars, exclusive of costs, as will mor- fully appear by reference to the complaint herein; that the time to answer said complaint has not expired and will not expire until Dec. 14, 1888, and that by reason of the premises
9 the petitioner is entitled, under the acts of Congress for such cases made and provided, to remove the said suit into the

circuit court of the United States for the district of Minnesota for the proceedings therein, and to that and herewith tenders to this court proper and sufficient surety for the doing by it of the several things required by the said acts to be done upon the removal of a cause from a State court into a United States court.

Wherefore your petitioner prays that the said surety may be accepted and that this court proceed no further in the said cause, and that the same be transmitted to the circuit court of the United States for further proceedings therein.

Dated December 10th, A. D. 1888.

JNO. C. BULLITT, JR.,
Attorney for Petitioner, St. Paul, Minn.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Personally came before the undersigned Jno. C. Bullitt, Jr., attorney for the petitioner in the foregoing petition, and, having been by me first duly sworn, did depose and say that the several allegations of the foregoing petition are tru- to the best of his knowledge, information, and belief.

Subscribed and sworn to before me on the 10th day of Dec., A. D. 1888.

[NOTARIAL SEAL.]

P. P. STARIN,
Notary Public, Ramsey Co., Minn.

10 STATE OF MINNESOTA, } ss:
County of Stearns, }

GEORGIANNS C. BOOTH, as Administratrix of the Estate of Fred. D. Booth, Deceased,
against
NORTHERN PACIFIC RAILROAD COMPANY.

Bond of Removal to United States Court.

Know all men by these presents that we, Jno. C. Bullitt, Jr., as principal, and N. C. Thrall and J. M. Hannaford, all of St. Paul, Minn., sureties of the Northern Pacific Railroad Company, are held and firmly bound unto Georgianna C. Booth, administratrix of the estate of Fred. D. Booth, deceased, the plaintiff in the above-entitled suit, in the penal sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we hereby bind ourselves and our executors and administrators, jointly and severally, firmly by these present-.

Sealed with our seals and dated on the 10th day of December, A. D. 1888.

Whereas the said Northern Pacific Railroad Company has filed its petition in the court aforesaid praying for the removal into the circuit court of the United States for the district of Minnesota of the above-entitled suit under and by virtue of the acts of Congress for such cases made and provided:

Now, therefore, if the said Northern Pacific Railroad Com-
11 pany shall enter in the circuit court of the United States for the district of Minnesota on the first day of its next session hereafter copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, in such case the above obligation to be void, but otherwise to remain of full force and effect.

JNO. C. BULLITT, JR. [SEAL.]
N. C. THRALL. [SEAL.]
J. M. HANNAFORD. [SEAL.]

Signed, sealed, and delivered in presence of—
JAMES E. MAHONEY.
P. P. STARIN.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Personally came this day before the undersigned, a notary public in and for the said county of Ramsey, John C. Bullitt, Jr., N. C. Thrall, and J. M. Hannaford, the same persons who signed and sealed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

Dated December 10th, 1888.

P. P. STARIN,
Notary Public, Minnesota.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Personally came before the undersigned N. C. Thrall and J. M. Hannaford, the same persons who signed and sealed the foregoing instrument, and each having been first duly sworn did depose and say that he is a resident and freeholder of this State and worth the sum of five hundred dollars above debts, liabilities, and property exempt from levy and sale under execution:

N. C. THRALL.
J. M. HANNAFORD.

Subscribed and sworn to before me this 10th day of December, A. D. 1888.

P. P. STARIN, [SEAL.]
Notary Public, Ramsey County, Minn.

12 STATE OF MINNESOTA, } ss:
County of Stearns, Seventh Judicial District, }

I, A. L. Cramb, clerk of the district court in and for the county of Stearns, in the State of Minnesota, do hereby certify that I have compared the annexed and foregoing copy of the complaint and verification, answer, verification, order of court, petition, and bond for removal to U. S. court in the cause entitled Georgianna C. Booth, as administratrix of the estate of Fred. D. Booth, deceased, pl'ff, *vs.*

The Northern Pacific Railroad Company, def't, with the originals remaining on file in my office, and that the same are true and correct transcripts of said originals and of the whole thereof.

Seal District Court, Stearns County.

Witness my hand and the seal of said court, at the city of St. Cloud, in said county, this 25th day of April, A. D. 1889.

A. L. CRAMB, *Clerk.*
By —— ——, *Deputy.*

(Endorsed:) Filed May 3rd, 1889. Oscar B. Hillis, clerk.

13 And afterwards, on the 8th day of January, A. D. 1890, came the above-named plaintiff, by her attorney, and filed her reply to the answer of the above-named defendant in the words and figures as follows, to wit:

14 In the Circuit Court of the United States for the District of Minnesota.

GEORGIANNA C. BOOTH, Administratrix of the Estate of Fred. D. Booth, Deceased, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant.

The plaintiff above named, for reply to the answer of the defendant in the above-entitled action, denies the same and each and every allegation therein contained except as in her complaint or in this reply admitted or qualified.

Fol. 2. The plaintiff denies that at the time of the accident alleged in the complaint Fred. D. Booth was in any manner negligent, or that said Fred. D. Booth by means of any negligence on his part or otherwise contributed to his death — to the accident and injury described in the complaint; and the plaintiff alleges that said accident and injury and death was caused solely by the negligence of said defendant, as set up in the complaint.

Wherefore the plaintiff prays judgment as in her complaint demanded.

J. D. SULLIVAN,
Plaintiff's Attorney, St. Cloud, Minn.

STATE OF MINNESOTA, *County of Ramsey,* } *ss:*

J. D. Sullivan came before me personally and, being duly sworn, doth say that he is the plaintiff's attorney in the above-entitled action; that the foregoing pleading is true to the best of his knowledge, information, and belief, and that the reason why this affidavit of verification is not made by said plaintiff is that she is ab-

15 sent from the State of Minnesota, wherein resides this affiant, her said attorney, and further saith not.

J. D. SULLIVAN.

Subscribed and sworn to before — on this 18th day of December, A. D. 1888.

THOS. D. O'BRIEN,
[NOTARIAL SEAL.] *Notary Public, Minn.*

(Endorsed:) Filed Jan'y 8th, 1890. Oscar B. Hillis, clerk.

16 And afterwards, on the 8th day of January, A. D. 1890, the following proceeding of court was had, to wit:

17 United States Circuit Court for the District of Minnesota.

Term Minutes, December Term, A. D. 1889, January 8th, 1890, page 408, H.

G. C. BOOTH, Administratrix, etc.,
vs.
NORTHERN PACIFIC RAILROAD COMPANY. } D. Law. 616.

This cause being regularly called for trial, the plaintiff appears, by her attorneys, J. D. Sullivan and T. D. O'Brien, and the defendant, by its attorney, J. C. Bullitt, Jr.

Thereupon defendant's attorney withdraws the motion for a continuance, and on motion of plaintiff's said attorneys it is ordered that a jury come, to wit:

O. Mulgren, Nocholas Hardy, J. A. Culverwell, W. Church, F. X. Brosseau, Geo. W. Riddle, Adam Finck, Patrick McGirr, Henry Athey, E. Treasure, P. B. Walker, and H. R. Gardner, twelve good and lawful men, who are duly sworn to try the issues joined herein.

And the trial of said cause is proceeded with as follows, to wit:

T. D. O'Brien opens the case for plaintiff.

Mrs. G. C. Booth sworn and examined for plaintiff.

Documentary testimony offered in evidence on behalf of plaintiff.

Alfred S. Corrigan sworn and examined for plaintiff.

George H. Woodhouse sworn and examined for plaintiff.

And here the plaintiff rests.

John C. Bullitt, Jr., opens the case for defendant.

And the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until to-morrow morning at 10 o'clock.

18 United States Circuit Court, District of Minnesota.

G. C. BOOTH, Admins., etc.,
vs.
NORTHERN PACIFIC R. R. Co.

1. O. Mulgrew, St. Paul.
2. Nicholas Hardy, "
3. J. A. Culverwell, "
4. W. Church, "
5. F. X. Brosseau, "

6. Geo. W. Riddle, St. Paul.
7. Adam Finck, "
Patrick McGirr, "
9. Henry Athey, "
10. E. Treasure, "
11. P. B. Walker, Minneapolis.
12. H. R. Gardner, "

(Endorsed:) Filed Jan. 8th, 1890. Oscar B. Hillis, clerk.

19 And afterwards, on the 9th day of January, A. D. 1890, the following proceeding of court was had, as follows, to wit:

20 United States Circuit Court for the District of Minnesota.

Term Minutes, December Term, A. D. 1889, January 9th, 1890, page 412, H.

G. C. BOOTH, Administratrix, etc.,
vs.
NORTHERN PACIFIC RAILROAD COMPANY. } D. Law. 616.

This day again come the parties herein, by their respective attorneys, and the jury sworn to try this cause.

Thereupon the further trial of the same is proceeded with as follows, to wit:

E. A. Hammer sworn and examined for defendant.
E. A. Pearson " " " " "
P. Shevlin " " " " "
—— Woodhouse " " " " "
Andrew Van Wagoner sworn and examined for defendant.
R. F. Bell sworn and examined for defendant.
W. P. Spaulding sworn and examined for defendant.
J. C. Turney sworn and examined for defendant.
Documentary testimony offered in evidence for defendant.
And here the defendant rests.
John C. Bullitt, Jr., sums up the case for defendant.
T. D. O'Brien sums up the case for plaintiff.

The court instructs the jury and, by agreement of the attorneys for the respective parties, instructs them that is they agree upon a verdict before the incoming of the court to-morrow morning they shall place the same under seal and return it into court by their foreman.

A. B. Brackett is sworn to take charge of the jury.

Ordered that if necessary that the marshal shall furnish the jury with their meals.

21 And afterwards, on the 10th day of January, A. D. 1890, the following proceeding of court was had, as follows, to wit:

22 United States Circuit Court for the District of Minnesota.

Term Minutes, December Term, A. D. 1889, January 10th, 1890, page 415, H.

GEORGIANNA C. BOOTH, as Administratrix of the Estate of Fred. C. Booth,
vs.
NORTHERN PACIFIC RAILROAD COMPANY. } D. Law. 616.

This day again come the parties herein, by their respective attorneys, and the jury, having heretofore retired to consider of their verdict, come now and return into court, by their foreman, their verdict in the words and figures as follows, to wit:

"We, the jury in the case of Georgianna C. Booth *vs.* Northern Pacific R. R. Co., find for the plaintiff and assess the damages at five thousand (5,000) dollars.

"H. R. GARDNER, *Foreman.*"

Thereupon, upon motion of defendant's said attorney, it is ordered that all proceedings herein be, and they are hereby, stayed for a period of forty-two days (42) from date hereof for leave for defendant to move in arrest of judgment and for a new trial of said cause.

23 We, the jury in the case of Georgianna C. Booth *vs.* Northern Pacific R. R. Co., find for the plaintiff and assess the damages at ($5,000.00) five thousand dollars.

H. R. GORDON,
Foreman of the Jury.

Jan. 10, 1890.

(Endorsed:) Filed Jan. 10th, 1890. Oscar B. Hillis, clerk.

24 And afterwards, on the 14th day of February, comes the defendant, by its attorney, and files the following petition for a new trial in the words and figures as follows, to wit:

25 United States Circuit Court, District of Minnesota.

GEORGIANNA C. BOOTH, as Administratrix of the Estate of Fred. D. Booth, Deceased, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The defendant above named respectfully petitions the court to set aside the verdict heretofore rendered in said cause and to grant a new trial of said cause upon the following grounds, to wit:

First. That the verdict is not justified by the evidence.

Second. That errors in law were committed at the trial of said cause and were duly excepted to by said defendant.

Third. That the damages are excessive and appear to have been given under the influence of passion or prejudice.

And the defendant further petitions that the stay of proceedings which has heretofore been granted in said cause be continued until its motion for a new trial is determined.

Dated February 6th, 1890.

JOHN C. BULLITT, JR.,
Attorney for Defendant.

(Endorsed:) Filed 14th of Feb'y, 1890. Oscar B. Hillis, clerk.

I hereby certify that I have made the within petition for a new trial in the above-entitled action, and the same is hereby allowed to be filed, and it is hereby ordered that all proce-dings be, and the same is hereby, stayed until said motion for a new trial herein is heard & decided.

R. R. NELSON, *Judge.*

26 And afterwards, on the 15th day of February, comes the defendant, by its attorney, and files its motion in arrest of judgment in the words following, to wit:

27 United States Circuit Court, District of Minnesota.

GEORGIANNA C. BOOTH, as Administratrix of the Estate of Fred. D. Booth, Deceased, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The defendant in the above-entitled action hereby moves that the judgment upon the verdict heretofore rendered in said cause be arrested, and that judgment herein be entered in favor of said defendant and against said plaintiff upon the ground that the complaint in this action does not state facts sufficient to constitute a cause of action against said defendant.

Dated February 6th, 1890.

JOHN C. BULLITT, JR.,
Attorney for Defendant.

(Endorsed:) Filed Feb. 15th, 1890. Oscar B. Hillis, clerk.

28 And afterwards, on the 28th day of April, A. D. 1890, the following proceeding of court was had in the words as follows, to wit:

29 United States Circuit Court for the District of Minnesota.

Term Minutes, December Term, A. D. 1889, April 28th, 1890.

T. M., vol. 1, page 131.

G. C. BOOTH, Administratrix, etc.,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY. } D. Law. No. 616.

Defendant's motion in arrest of judgment and to set aside the verdict rendered herein and for a new trial of said cause coming on

to be heard, same is fully argued on behalf of the defendant by John C. Bullitt, Jr., and on behalf of plaintiff by T. D. O'Brien, duly submitted, and by the court taken under advisement.

30 And afterwards, on the 12th day of May, A. D. 1890, the following proceeding of court was had in the words and figures as follows, to wit:

31 United States Circuit Court for the District of Minnesota.

Term Minutes, Dec. Term, A. D. 1889, May 12th, 1890.

T. M., vol. 1, page 138.

GEORGIANNA C. BOOTH, Administratrix of the Estate of Fred. D. Booth, Deceased,
vs.
NORTHERN PACIFIC RAILROAD COMPANY. } D. Law. 616.

Defendant's motion in arrest of judgment and to set aside the verdict rendered herein and for a new trial of this cause having been heretofore fully heard, duly submitted, and by the court taken under advisement—

Now, the court, after due consideration thereof, *and* being fully advised in the premises, it is ordered that said motion in arrest of judgment, to set aside the verdict, and for a new trial be, and the same is hereby, overruled and denied.

Thereupon, upon motion of plaintiff's attorney, T. D. O'Brien, it is considered, ordered, and adjudged that the above-named plaintiff do have and recover of and from the above-named defendant the sum of five thousand dollars ($5,000.00), the amount found to be due by the jury, *d*esides her costs and disbursements herein, to be taxed, and that she have execution therefor.

32 And afterwards, on the 21st day of May, A. D. 1890, comes the plaintiff, by her attorney, and files the statement of plaintiff's costs and disbursements in the words and figures as follows, to wit:

33 In the Circuit Court of the United States, District of Minnesota.

GEORGIANNA C. BOOTH, as Administratrix of the Estate of Fred. D. Booth, Deceased, Plaintiff,
against
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Statement of Plaintiff's Costs and Disbursements.

Docket	$20 00
Witness fees: Geo. Woodhouse; residence, Fergus Falls, Minn.; travelled 186½ miles in going to and returning from St. Paul, Minn., when court was held from his said residence and was necessarily in attendance on court two days	21 38

Sherman Corrigan, fees prepaid to him as witness when case was set for trial for June 17th, 1889, at general June term, and said Corrigan was subpœnaed, at Duluth, in expectation of case being called for trial on said June 17th, 280 miles and 1 day's attendance	$17 80
Paid judge of probate of Stearns county, Minn., for certified copy letters of administration used in evidence	1 25
Paid sheriff of St. Louis county for service of subpœna on Corrigan	1 00
Paid sheriff of Ottertail county for service of subpœna of Woodhouse	1 00
Fees of clerk of district court of Stearns county, where action was commenced	1 45
Fees of clerk of circuit court for Minnesota to be by him taxed	
Fees of sheriff of Stearns county, Minn., for service of summons herein	10 00
Costs taxed at	$82 88

OSCAR B. HILLIS, *Clerk.*

34 STATE OF MINNESOTA, } ss:
County of Stearns, }

J. D. Sullivan came before me personally and, being first duly sworn, says that he is the attorney of record herein for the within-named plaintiff; that the within-named Geo. Woodhouse was a witness upon the trial of said action for plaintiff and was actually called, sworn, and testified therein; that his place of residence at time of service of subpœna herein upon him was at Fergus Falls, Minn., and so continued to be after said service and is now; that he actually travelled 373 miles in going to and from his said residence to St. Paul, the place of trial of said action, an- was actually necessarily in attendance thereon at said St. Paul 2 days.

That the within-named witness Sherman Corrigan was actually sworn and called upon to testify on behalf of plaintiff at trial of said action and has already been relied upon by plaintiff as a witness for her upon a trial thereof; that when said case was originally set for trial in said circuit court it was set for June 17th, 1889; and plaintiff, believing that said case woul- come on for hearing and trial upon said date, caused said Corrigan to be subpœnaed at what was then his place of residence, at the city of Duluth, Minn., and actually paid him as witness fees and mileage the sum herein charged, being the amount said witness would have been entitled to for mileage and one day's attendance had he actually attended upon said June 17th, being 280 miles going and returning and ones day's attendance.

That the other items, to wit, judge of probate, clerk of district court for Stearns county, Minn.; sheriff of Stearns county, Minn.; sheriff of St. Louis Co., Minn.; sheriff of Ottertail Co., Minn., and

clerk of circuit court, district of Minn., have been necessarily herein and must be paid by plaintiff, part thereof being already paid.

J. D. SULLIVAN.

35 Subscribed and sworn to before me this 13th day of May, 1890.

PETER BRICK,
Notary Public, Minn.

[NOTARIAL SEAL.]

(Endorsed:) Filed May 21st, 1890. Oscar B. Hillis, clerk.

In the Circuit Court of the United States, District of Minnesota.

GEORGIANNA C. BOOTH, as Administratrix of the Estate of Fred. D. Booth, Deceased,
against
NORTHERN PACIFIC RAILROAD COMPANY.

SIR: You will please take notice that on the 17th day of May, A. D. 1890, at ten o'clock a. m., application will be made to Oscar B. Hillis, Esq., clerk of said court, at his office, in the city of St. Paul, in the county of Ramsey and State of Minnesota, to have the costs and disbursements in the above-entitled action, a copy of which, duly sworn to, *are* hereto annexed, taxed and inserted in the judgment entered herein.

Dated May 14th, 1890.

Yours respectfully,

J. D. SULLIVAN,
Attorney for Pl'ff.

To Jno. C. Bullitt, Jr., attorney for defendant.

36 And afterwards, on the 19th day of May, A. D. 1890, the following proceeding of court was had in the words and figures as follows, to wit:

37 United States Circuit Court for the District of Minnesota.

Term Minutes, Dec. Term, A. D. 1889, May 19th, 1890.

GEORGIANNA C. BOOTH, Administratrix, etc.,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

It appearing to the court that the clerk failed to compute the interest upon the verdict in the judgment entered in this cause on May 12th, 1890—

Now, on motion of John C. Bullitt, Jr., attorney for the defendant, it is ordered that said judgment be amended so as to read as follows: "It is considered, ordered, and adjudged that the above-named plaintiff do have and recover of and from the above-named defendant the sum of five thousand dollars ($5,000.00), the amount found to be due by the jury, together with the sum of one hundred sixteen and $\frac{73}{100}$ dollars ($116.73), the amount of interest thereon

from the rendition of the verdict to date, besides her costs and disbursements herein to be taxed, and that she have execution therefor."

T. M., vol. 1, page 142.

38 And afterwards, on the 3rd day of July, A. D. 1890, the following proceeding of court was had in the words as follows, to wit:

39 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1890, July 3rd, 1890.

T. M., vol. 2, page 61.

GEORGIANNA C. BOOTH, as Administratrix of the Estate of Fred. D. Booth, Deceased,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY. } D. Law 616.

This day comes the plaintiff, by her attorney, and moves the court to vacate and set aside the order heretofore entered herein amending the judgment entered herein on the 19th day of May, 1890.

After hearing the statements of said attorneys, it is ordered that said motion to vacate said amendments of said judgment be, and the same is hereby, overruled and denied.

40 And afterwards, on the 26th day of August, A. D. 1890, the following bill of exceptions was filed in the words and figures following, to wit:

41 United States Circuit Court, District of Minnesota.

GEORGIANNA C. BOOTH, as Administratrix of the Estate of Fred. D. Booth, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

This action was tried the December term, 1889, of said court, on January 8th and the following days, before the Hon. R. R. Nelson and a jury.

This action was brought to recover damages for the death of the plaintiff's intestate while acting as brakeman in the yard at Glyndon, Minnesota, on July 21st, 1888, while endeavoring to uncouple two cars in a freight train of which he was brakeman.

The charge of negligence against the defendant was that the legislature of the State of Minnesota had by an act passed on March 7th, 1887, being chapter 16 of the General Laws of Minnesota for 1877, provided as follows:

Any person or persons, railroad companies or corporations, owning or operating any railroad or railroads in this State shall be and are hereby required on or before the first day of June, A. D. one thousand eight hundred and eighty-seven, to so adjust, fill, block,

and securely guard the frogs, switches, and guard-rails on their roads in all yards, divisional and terminal stations, so as to thoroughly protect and prevent the feet of employés and other persons from being caught therein.

Any person or persons, railroad company or corporation, owning and operating a railroad in this State who shall fail to comply with the provisions of this act shall be fined in a sum of not less than five hundred dollars nor more than two thousand dollars, in the discretion of the court, for each offense, and the neglect of any such person, company, or corporation to comply with the provisions of this act shall be deemed a violation of the same.

42 All railroad companies owning or operating railroads or portions of railroads in this State shall, in addition to the penalties prescribed in this act, be liable for any damages resulting from the failure to comply with the provisions thereof, such damage to be recovered by the persons injured or his or her legal representatives.

And that the defendant had negligently failed to block the guard-rail, and thereby the plaintiff's intestate got his foot caught therein and was killed in consequence.

The defendant put in issue the negligence charged against the defendant, and alleged that the accident and consequent death of the plaintiff's intestate was occasioned by the fault and negligence of the plaintiff's intestate and not otherwise; all of which appears in the pleadings.

The plaintiff, to maintain the issues on *his* part, called as a witness Mrs. G. C. Booth, who testified that she was the plaintiff in the action, administratrix of the estate of Frederick D. Booth, deceased, who was her son; that she had two boys and no other children, and that the brother of the deceased was still alive, and that she was a widow; that the intestate was 24 years old at the date of his death, was sober and industrious and a bachelor.

His death occurred on July 22nd, at 9 a. m.

The plaintiff then produced the witness Sherman Corrigan, who on direct examination testified that he was employed as brakeman of a freight train on the defendant's road at the time of the accident and had been so employed about one year and a half; that he was rear brakeman and plaintiff's intestate head brakeman on freight train No. 17, leaving Brainerd, Minnesota, in the morning of July 21st, going west, and due at Fargo in the afternoon of that day; that the train consisted of 20 cars, and reached Glyndon, a station

43 about thirteen miles east of Fargo, about 1 p. m. of that day; that it was necessary to set out two cars from the train at this point, the first car to be set out being about seven or eight cars from the caboose, which was the rear car of the train, and the second being the 3rd or 4th car from the engine; that the main track of the defendant's road at Glyndon runs east and west; that the first track south of this is a side track called the passenger track, and the next track south is a side track called the loading track, the depot being north of the track; that the first thing we did when we arrived at Glyndon was to set out the car which was 7 or 8 cars from the caboose; the

caboose and rear cars of this train were left on the main track and the engine, with the front part of the train, backed the first car to be set out on the loading track, then backed the front of the train on the main track and coupled to the rear part of the train, then uncoupled the rear part of the train from the engine, and the three front cars and the engine then pulled west, passed the switch, and started to back down on the side track to leave the third car from the engine upon the loading track. Booth, the plaintiff's intestate, was at this time on the front part of the train, either on the top or at the side of one of the front cars, the witness did not remember which exactly. Conductor Hammons threw the switch the time the engine started to back the second car on the loading track, and just as the cars passed the frog in the switch witness heard Booth yell, and found Booth about a car length east of the frog and his leg off, which witness found crushed into the frog, the sole of the shoe being turned up.

Plaintiff's intestate died from his injuries the next day.
44 Witness further testified on his direct examination that plaintiff's intestate was at the time of his death a strong, active, bright man.

On cross-examination Corrigan testified that plaintiff's intestate had been working as brakeman for defendant for about a month and had run over this division with witness before; that there was a copy of the time-card for this division kept in the caboose for the instruction and guidance of the employés, which they could consult at any time, and that this time-card contained the rules of the company relative to the duties of brakemen and other employés.

Witness further testified that after the train was uncoupled to set out the second car he went towards the switch where Booth was caught to assist in setting out the second car, walking down between the main track and the side track, and while thus walking saw Booth signal the conductor after the conductor threw the switch, asking if he (Booth) should cut off the car at once, and conductor replied to Booth by a signal to back up slowly onto the side track and not to cut the car off just then. Witness further testified that the proper way to set those two cars out after the first car had been set on side track was to back the train with the second car back onto the side track and couple it with the car already standing on the side track, then to uncouple the last car thrown in from the train. Witness further testified that when the signals above mentioned passed between Booth and the conductor Booth was standing on top of the second or first car from the engine.

Witness further testified that the cars which plaintiff's intestate was about to uncouple at the time of the accident were air-brake cars, and that it was necessary to disconnect the hose before drawing the pin; that the usual way of uncoupling was while the cars were standing still, and that it is dangerous to uncouple when the
45 cars are moving. He further testified that from time Booth exchanged the signals with the conductor, who was standing at the switch, up to the time Booth was injured the train was backing down all the time. From the time it first started until he

was caught the train made no stop. It was moving about three miles an hour all the time. Booth was a storng man, a first-class brakeman in every respect and understood his business.

On redirect examination the witness testified as follows: That the men tried to work as fast as possible in switching.

(Q.) The conductor went over to the depot for his orders as soon as the cars were taken over and attached again and you moved on under his instructions, the train moving 3 or 4 miles per hour, and you don't think it an unusual matter if a good brakeman should go in there and couple and uncouple—don't you do it?

A. I would not do the same way; some do.

Q. You don't know how he did it?

A. No.

Q. He may have taken all the precautions, for all you know. Is it not usual to do as he did?

A. Some do and some do not.

Q. Do you think a brakeman could keep a position on your system if he made it an invariable rule not to cut off a car while the train was in motion under the speed of 3 miles per hour? Would a man keep his position who refused to do that constantly?

A. I have never known a man asked to do it.

Q. Did you ever know a man who didn't do it?

A. That would depend on the track.

Q. You have got to use discretion in your business, have you not?

46 A. Yes, sir.

Q. And it is just as common to cut off trains in motion as when standing still?

A. It is common.

The witness further testified that the condition of this car made the uncoupling of a train in motion an unusual thing for a brakeman to do, because the first car had been put on the side track, if he remembered rightly, and had not run far enough to allow the second one to come in and go clear of the passing train, and it was necessary to shove that on.

Afterwards the witness, on direct examination, testified that he did not remember positively that the condition of affairs was such as was referred to.

Plaintiff next introduced evidence tending to show that the frog, when Booth was injured, was not properly blocked.

The plaintiff introduced uncontradicted evidence tending to show that she was the duly appointed administratrix of the estate of Frederick D. Booth, deceased.

It was further established by the evidence that plaintiff's intestate was earning $70.00 per *day* at the time of his death.

Plaintiff rests.

To support the issues upon its part the defendant introduced E W. HAMMELL, who testified, on direct examination, that he was conductor on train No. 17, on which plaintiff's intestate was brakeman

at the sime he was injured; that it was Booth's second trip with him, and that Booth appeared to be a first-class brakeman; that there was a book of rules kept in the caboose upon the train upon which Booth made the two trips with him; that there was a time-card in the caboose with the book of rules; that the rules were on all time-cards; that he always instructed every one who comes as to the nature of the time-card and the book of rules, and they were habitually consulted by the trainmen on his train, including
47 Booth. Witness further testified that after the first car had been set out and the engine, with the front part of the train, had passed onto the side track witness pulled the switch to allow the front part of the train to back down on the main track. Booth then signalled to the witness to know whether he should cut the second car off, and witness signalled back not to cut the car off, but to back down the main track: that the cars with the caboose were too near the switch to allow the cars attached to be moved down the side track, the second car to be cut out being 6 or 8 cars nearer the engine than the first which was cut out, and that while the train was backing down the main track plaintiff received the injuries complained of.

The witness further testified as follows:

Q. Is it the duty of a brakeman to cut off a car when ordered by you as conductor?

A. No, sir.

Q. Who directs them?

A. Those who were in my car obey me unless there is anything in the rules tells them not to.

Q. Did you direct the cutting off the cars?

A. I gave the signals.

Q. You signalled him to cut off?

A. I did not. I signalled him not to cut off.

Q. Then, as I understand you, after you gave the signal not to cut off you gave no more signals whatever?

A. I gave no more. I know nothing about whether he obeyed the orders. I know nothing more about it.

The COURT: Why did you give no more orders, when you knew it was necessary to cut off the other car—cut off the two cars and then back down? You went in for orders before you cut off the other car.

A. I supposed when they had shoved the train clear across they would go on and cut off the car.

Q. You knew it was necessary to cut off the two cars and you had cut off the one. Why did you go in for orders when
48 you knew?

A. We do that right along.

Q. Did Booth know the two cars were to be set off?

A. Yes, sir.

Q. And one had been cut off?

A. Yes, sir.

Mr. BULLITT:

Q. Where was Booth standing when he gave you the signal?

A. It would be a pretty hard matter for me to say. I should judge it was the second or third car.

Q. Standing on top of the car?

A. Yes, sir.

A JUROR: Did you give Booth the order to cut off the two cars?

A. No; I don't think I did.

Booth gave witness signal while standing on top of second or third car from the engine. Witness did not see Booth after he gave him the signal until he was injured.

Defendant then produced evidence of various witnesses tending to show that the frog where Booth was injured was blocked in the most approved manner and with best blocking known, and that the same was in good condition and as perfect as could be made.

Defendant thereupon introduced in evidence and read to the jury the following rules, contained in the time-card and in the book of rules, which were kept on the caboose of the train in question for the guidance and instruction of the employés and being part of the rules already introduced in evidence:

Rule 25. Great care must be exercised by all persons when coupling cars. Inasmuch as the coupling apparatus of cars or engines cannot be uniform in style, size, or strength and is liable to be broken, and as from various causes it is dangerous to expose between the same the hands, arms, or persons of those engaged in coupling, all employés are enjoined before coupling cars or engines to examine so as to know the kind and condition of the draw-heads, draw-bars, links, and coupling apparatus, and are prohibited from placing in the train any car with a defective coupling until they have first reported its defective condition to the yard-master or conductor. Sufficient time is allowed and may be taken by employés in all cases to make the examination required. Coupling by hand is strictly pro-
49 hibited. Use for guiding the link a stick or pin. Each person having to make couplings is required to provide a proper implement for the purpose, as above specified. All persons entering into or remaining in the service of the company are warned that the business is hazardous, and that in accepting or retaining employment they must assume the ordinary risks attending it. Each employé is expected and required to look after and be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows, especially in the switching of cars and in all movements of trains. Stepping upon the front and rear of approaching engines, jumping on or off of trains or engines moving at a high rate of speed, getting between cars in motion to uncouple them, and all similar imprudencies are dangerous and in violation of duty and are strictly prohibited. Employés are warned that if they commit them it will be at their own peril and risk. Employés of every rank and grade are required to see for themselves before using them that the machinery or tools which they are expected to use are in proper condition for the service required, and, if not, to put

them in proper condition or see that they are so put before using them. All will be held responsible accordingly.

The frog was also introduced in evidence, and also Booth's shoe and its position in the frog indicated.

This was all the evidence adduced at said trial.

The court of its own motion charged the jury as follows:

50 *Charge of the Court.*

There are but two questions for you to determine in this case, gentlemen.

Suit has been brought by the administratrix of an employé of the defendant company who died from alleged injuries charged to have been suffered by the negligence of the defendant. That negligence charged in the complaint is failure in statutory duty, a duty imposed by the legislature of the State of Minnesota upon railroad companies operating in this State. The law in this State provides in the following language: "When death is caused by the wrongful act or omission of any party the personal representatives of the deceased may maintain an action, if he might have maintained an action had he lived, for the injury caused by the said act or omission. The damages in any case cannot exceed $5,000."

There is evidence here that the plaintiff is administratrix for the employé that was killed. He died July 21st, 1888, at Glyndon. He was injured on the afternoon of the 20th, it is proven and is charged in the complaint, by the negligence of the defendant company in failing to comply with the following law. On the 7th of March, 1887, the legislature of this State, recognizing the fact that the guard-rails and frogs at stations of divisions and in yards of the terminal stations of railroad companies were dangerous places not only to employés whose duties required them to be on the ground where those guard-rails were located, but also other persons who might, by permission of the company or by authority, be on the grounds, dangerous to them also, passed the following law:

51 "Any person or persons, railroad companies, or corporations owning or operating any railroad or railroads in this State shall be, and are hereby, required on or before the first day of June, 1887, to so adjust, fill, block, and securely guard the frogs, switches, and guard-rails on their roads in all yards, divisional and terminal stations so as to thoroughly protect and prevent their employés and other persons from being caught therein." That is the first section of the act, and I think there is sufficient evidence here from the testimony offered to show that Glyndon is a station upon a division of the road and, if I understand right, it is a divisional station, and all frogs, switches, and guard-rails must be inspected by the company in accordance with that law.

The first question for you to determine is, Has the plaintiff, by the evidence (and the burden of proof is upon the plaintiff), satisfied you that the defendant company failed to perform a duty required by the statute? The statute does not define the manner in which guard-rails shall be blocked or filled. It leaves it entirely to

the judgement of the railroad company to block and fill the frogs, switches, and guard-rails in any manner that they may see fit if or provided that they so adjust, block, and fill and securely guard the frogs, switches, and guard-rails as to thoroughly protect and prevent the feet of employés and other persons from being caught therein. Now, what was necessary for the company to do in order to fulfill this duty imposed by the statute and which defendant owed plaintiff's intestate, who was an employé and brakeman on that division at Glyndon? It was the duty of the company to exercise its best judgement, to exercise the highest degree of care, and omit no precaution which an ordinarily
52 prudent person would take under similar circumstances in order to block this frog so as to thoroughly protect and prevent the feet of the employés from being caught therein; and this is all that is required of it under the law. It was compelled to exercise a high degree of care in the manner in which the frog was blocked in this instance. The legislature has regarded these frogs as dangerous places, and the care to be exercised must be in proportion to the danger to be overcome. So it is for you to consider, as the first question in the case, whether, from the evidence which has been introduced before you, the company failed to fulfil the duty imposed upon it by the statute under the rule which I have given you. Now, it has been shown here by the evidence that at the time of this accident there were different kinds of blocking and filling used by the companies in their frogs and guard-rails, and if defendant at the time of this accident had adopted the best and most approved which *was* then known for blocking and guarding the rails or frogs and kept them in good condition at all times, then it fully complied with the requirements of this act. This duty, moreover, was a continuing one. This defendant was required at all times to keep this frog so adjusted that it would protect the employés working about it and prevent their catching their feet in them—that is, they were to exercise the highest degree of care by providing a blocking which would so thoroughly protect the employés working about them and prevent the catching their feet in them. That is the first question for you. If you think the company failed to exercise a high degree of care in order to keep this block in safe condition, if it omitted any precaution
53 which an ordinarily prudent person would have taken under the circumstances and allowed this frog which had been put in there, if it was safe at the time it was put in, to become unsafe from being worn down so that an employé's or other person's foot would be caught therein, then it failed to fulfil its duty, and the company would be negligent, and if this caused the injury plaintiff is entitled to a verdict, and it is for you, gentlemen, to say, from all the evidence in this case, whether the company was negligent or not. If defendant was not negligent and there was full performance of its duty under the statute defendant would be entitled to a verdict, for the burden of proof is on the plaintiff to establish her case by preponderance of evidence. The implication of the law is that defendant performed and fulfil-ed its duty; the allegation of the

breach of this duty on the part of the plaintiff. The burden of proof is upon her by preponderance of evidence to establish that fact. So, if she has failed to satisfy you that the company was negligent in respect to the blocking of this frog, that is an end to the case, and your verdict should be for the defendant; but if she has from the evidence satisfied you that the company was negligent in its duty of guarding and protecting its frog, and this caused the injury, then plaintiff would be entitled to recover, provided plaintiff's intestate was not guilty of any negligence—that is, unless defendant to your satisfaction proved the defense set up by it and relied upon in the trial of this case.

The company denies that it failed to fulfil any statutory duty or that it was negligent in any respect, and says that it has provided the best possible appliances under the law and exercised the
54 highest degree of care to prevent the feet of employés from being caught in the frog.

There is a question, 2nd, of contributory negligence for you to consider. If you should determine from the evidence that plaintiff failed in his duty under this statute and that negligence has been proven by the evidence—the charge is that plaintiff's intestate was guilty of contributory negligence in failing to exercise care and caution on his part, which contributed to the injury, and but for that negligence the injury would not have happened—that is an affirmative defense. The burden of proof is shifted when such a defense is set up, and defendant company must prove to your satisfaction by weight of evidence that plaintiff's intestate by failing to exercise proper care and caution on his part contributed to the injury which caused the death. It is not necessary for me to say that the position of a brakeman and the duties imposed upon him are exceedingly dangerous, so regarded not only by railroad men, but anybody who has had any experience and knows anything about the management of railroads. It is a very hazardous duty, and when a brakeman enters into the service he assumes all the ordinary risks incident to his employment. He does not, however, assume the risks of defective equipments or defective blocking of frogs, which is imposed upon the railroad company by the legislative act.

Now, it is claimed in this case that plaintiff's intestate was guilty of contributory negligence. It is claimed by defendant that plaintiff's intestate went between the cars while in motion to uncouple; that it is a very dangerous and hazardous thing to do. Undoubtedly it is. It was known, however, by the brakemen, as has been testified to here by witnesses, that it was necessary the cars
55 should be uncoupled in order to throw them upon the switch, and the mere fact that a brakeman or plaintiff's intestate in this case went between the cars (if you believe he did go) when in motion is not conclusive evidence of contributory negligence on his part. It depends upon a variety of circumstances. It depends upon the rapidity with which the train moved. It depends upon whether there was a rule of the company which he violated, and the violation of which rule directly contributed to his injury.

Now, the charge in the complaint is that plaintiff's intestate was

injured on account of the defective blocking of this frog, and it is very proper for you when the charge of contributory negligence is alleged to take into consideration all the circumstances under which the brakeman attempted to perform his duty, if you believe he went in to uncouple the cars at the time his foot caught in this frog, if it did catch there. So that I say it is a question for the jury to determine, and you must take into consideration the fact that a rule of the company existed prohibiting the brakemen from uncoupling the cars when in motion.

If that fact directly contributed or directly caused the death or injury resulting in death, of course it would bar recovery, but it must be what is called the proximate cause of the death or injury before it would. So it is a question for the jury to determine upon all the evidence in the case whether plaintiff's intestate exercised the care and caution necessary under all the circumstances or whether he was guilty of contributory negligence in doing as he did at the time he was injured. If you should determine the company was negligent under all the circumstances in failing to fulfil its duty under the statute, and this caused the injury, and that plain-
55½ tiff's intestate was not guilty of contributory negligence, then, of course, plaintiff would be entitled to a verdict in this case, and it would be for you to determine what the amount is he should be entitled to upon the evidence in the case.

It is shown here that the brakeman, Booth, was about 24 years of age; that he was a skilful brakeman; that he was in robust health or good health; that he was earning somewhere about $70, and that those are proper elements for the jury to determine as to what would be his probable expectation of life. Sometimes tables are offered, which are proper for the jury to consider, showing what is the average length of life where a person has arrived at a certain age, but it is not conclusive but is proper evidence and oftentimes is offered when it is proper for the jury to say upon the evidence what the probable length of life would be when a man has arrived at the age of 24 years and has industrious habits. Nothing has been said to show that he was not, and, in fact, it has been shown that he was a skilful brakeman, and it has been stated, though not in evidence, that he was so regarded by the company.

It is unnecessary that the survivors for whose behalf suit is brought should have any legal claim upon the deceased. The whole question of damages is left to the determination of the jury. There must have been some pecuniary damage, and it is for the jury to determine what that loss is from the evidence as to age, habits, and life of the deceased.

56 Several instructions have been presented by counsel for defendant, requesting me to give them to you. Some I give; some I refuse. I refuse 1, 2, 3, 4. 5 I shall give you. Defendant was not negligent if it blocked the frog in the most approved way and maintained it in good condition thereafter.

6 I will give you; and if defendant blocked the frog in the best manner approved by experience it was, it must be made to appear

that the deceased, Fred. Booth, was killed because of this frog being imperfectly blocked.

12th. There is no dispute about that—unless plaintiff is administratrix of Booth she cannot recover—but there is evidence to consider. The probate letters of administration have been offered.

13th. The burden is upon plaintiff to prove pecuniary injury resulting from death of the deceased, and unless plaintiff proves such pecuniary injury resulting from the death of deceased—but damages are not confined to immediate loss of money to those for whose benefit the action is brought. I strike out the balance of that—all after the word "deceased."

14th. Damages are to be computed from the reasonable expectation of pecuniary benefit by the continuance of the life of the deceased—that is, after the accident. The mere fact that a person has been killed and somebody has taken out letters of administration is not sufficient evidence even if he was killed by negligence of the railroad, but if it is shown *ge* was a man of good habits or at least engaged in some advantageous employment and his age given and condition of health at the time, then it is for the jury to determine what amount of damages should be given to the administratrix.

57 The 15th is refused.

It may be necessary for me to say that the railroad company did not insure absolute safety to employees working about these frogs and switches and guard-rails—dangerous places—but the railroad company does, by virtue of its contract with its employees, agree that they will exercise a high degree of care to see that the frogs at the divisional station *is* properly guarded or so thoroughly adjusted, in the language of the statute, which you men have when you retire, as to prevent the feet of the employees being caught in them.

Then again the law provides, as I stated to you, that nothing can be recovered to exceed $5,000.00, and it is for you to determine upon the evidence as to whether the amount shall be that or less than that amount.

Defendant excepts to the refusal to give instructions 1, 2, 3, 4, & 7 (separate exceptions to each); also to refusal to 13th as requested, and excepts to the remarks made by the court in explanation of 14; also excepted to refusal to 15.

Also excepts to that part of the charge which instructs the jury that under the laws of this State defendant must block its frogs in such a way as to thoroughly protect the feet of employees and others, that it would be impossible.

The COURT: I think the jury understood me. They must exercise the highest degree of care to so thoroughly adjust and block, not to absolutely insure safety—to furnish the best appliances and use their best judgment.

There are three questions submitted, which your may answer or not, as you please. I won't compel you to.

58 Mr. BULLITT: One other point. That portion of your charge where you tell the jury that plaintiff going in between the cars, in order to be contributory negligence to preclude recovery, must be the proximate cause, the point being if it should be one of the proximate causes.

The COURT: The going in between the cars was not negligence *per se*. It depended upon a variety of circumstances. When a man's disregard of any reasonable rule (and this was a reasonable rule) is the direct cause, directly contributed.

Mr. BULLITT: As I understand your honor, it need not be the sole cause, but if it combined and co-operated with the negligence of the defendant.

Also exception to the charge on question of damages.

The following were the results made by the defendant:

The defendant's counsel duly requested the court, among other things, to charge the jury as follows:

First. The jury is instructed to bring in a verdict for the defendant.

The court refuses so to charge, and the defendant's counsel duly except to the ruling of the court.

The defendant's counsel requested the court, among other things, to charge the jury as follows:

Second. Plaintiff's intestate was guilty of contributory negligence and hence plaintiff cannot recover.

The court refused so to charge the jury, and the defendant's counsel duly excepted to the ruling and decision of the court.

The defendant's counsel requested the court, among other things, to charge the jury as follows:

59 Third. If Mr. Booth, plaintiff's intestate, went in between the cars while in motion for the purpose of uncoupling them in violation of a rule of defendant known to him he was guilty of negligence, and the verdict must be for the defendant.

The court refuses so to charge, and the defendant's counsel duly excepted to the ruling and decision of the court.

The defendant's counsel requested the court, among other things, to charge the jury as follows:

Fourth. Plaintiff's intestate, being an employee of defendant, must be presumed to have been familiar with the defendant's rules in the absence of evidence that he was ignorant of said rules.

The court refused so to charge, and the defendant's counsel duly excepted to the ruling and decision of the court.

The defendant's counsel requested the court, among other things, to charge the jury as follows:

Fifth. If the best manner of blocking the frog proved by experience did not require the blocking to be extended over the fish-plates, then the defendant was not negligent in failing to put the blocks over the fich plates or straps.

Which charge was given by the court.

The defendant's counsel requested the court, among other things, to charge the jury as follows:

Sixth. If the blocking could not have been extended over the fish-plates or straps in the frog, but it was stopped before reaching said fish-plates because it was impracticable to put the blocks over the fish-plates, defendant was not negligent in failing to put the blocks over the fish-plates or straps.

60 Which charge was given by the court.

The defendant's counsel requested the court, among other things, to charge the jury as follows:

Seventh. The burden is upon the plaintiff to prove pecuniary injury resulting from the death of deceased, and unless plaintiff proves such pecuniary injury she is in any event entitled only to nominal damages.

Which charge the court changed and modified and gave as follows:

The burden is upon the plaintiff to prove the pecuniary injury resulting from the death of deceased, but damages are not confined to an immediate loss of money to those for whose benefit the action is brought.

To which modification, addition, and change of said charge the defendant duly excepted and to the ruling and decision of the court thereon.

The defendant's counsel requested the court, among other things, to charge the jury as follows:

Eighth. The plaintiff is entitled upon the evidence in the case to recover only nominal damages in any event.

The court refused so to charge, and the defendant's counsel duly excepted to the ruling and decision of the court.

The foregoing bill of exceptions is hereby certified to as correct, and is hereby settled, allowed, and signed and sealed.

Dated August 2nd, 1890.

R. R. NELSON, *Dist. Judge.* [SEAL.]

(Endorsed:) Filed Aug. 26th, 1890. Oscar B. Hillis, clerk.

61 And afterwards comes the defendant, by its attorney, and files the following petition in words as follows, to wit:

62 United States Circuit Court, District of Minnesota.

GEORGIANNA C. BOOTH, Administratrix of the Estate of Fred. D. Booth, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To the honorable the judge of the circuit court of the United States for the district of Minnesota:

Your petitioner, The Northern Pacific Railroad Company, the defendant in the foregoing action, respectfully shows that by the judgment heretofore rendered by said United States circuit court for the district of Minnesota in the above-entitled cause a manifest error hath happened, to the great damage of your petitioner, in this,

that a great and manifest error of law occurred at the trial of said cause against the objection of said petitioner and to its great damage, all of which will more fully appear by the record of said cause in said court.

Wherefore your petitioner prays your honor to allow a writ of error from the Supreme Court of the United States, to be directed to the said circuit court of the United States for the district of Minnesota, whereby, under the seal of said circuit court for the district of Minnesota, the record and proceedings aforesaid, with all things concerning the same, may be transmitted to the Supreme Court of the United States, together with said writ of error, that, the record and proceedings aforesaid being duly inspected, the said Supreme Court of the United States will cause further to be done
63 therein to correct that error what of right and according to the laws and customs of the United States should be done.

JNO. C. BULLITT, JR.,
Attorney for Petitioner.

(Endorsed:) Filed Aug. 26th, 1890. Oscar B. Hillis, clerk.

64 And afterwards comes the defendant, by its attorney, and files a præcipe to issue a writ of error in the words following, to wit:

65 & 66 United States Circuit Court, District of Minnesota, *ss:*

GEORGIANNA C. BOOTH, as Administratrix of the Estate of Fred. D. Booth, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To Oscar B. Hillis, Esq., clerk of the above-named court.

SIR: Please issue a writ of error to the Supreme Court of the United States in the above-entitled action, and oblige,

Yours truly, JNO. C. BULLITT, JR.,
Attorney for Defendant.

(Endorsed:) Filed Aug. 26th, 1890. Oscar B. Hillis, clerk.

67 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Georgianna C. Booth, administratrix of the estate of Fred. D. Booth, deceased, plaintiff, and the Northern Pacific Railroad Company, defendant, a manifest error have happened, to the great damage of the said defendant, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do

command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday in October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 26th day of August, in the year of our Lord one thousand eight hundred and ninety,
68 and of the Independence of the United States the one hundred and fourteenth.

[SEAL.] OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

(Endorsed:) Filed Aug. 26th, 1890. Oscar B. Hillis, clerk.

UNITED STATES OF AMERICA, *District of Minnesota,* } ss:

The answer of the judges of the circuit court of the United States for the district of Minnesota, in the eighth circuit, in within writ mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America, within mentioned, in a certain schedule to this writ annexed, marked A, as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this 30th day of September, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth year.

U. S. Circuit Court Seal, Dist. of Minnesota, Third Division.

OSCAR B. HILLIS,
Clerk U. S. Circuit Court, Dist. of Minnesota.

69 And afterwards the following security or bail on error was filed in the words as follows, to wit:

70 United States Circuit Court, District of Minnesota.

GEORGIANNA C. BOOTH, Administratrix of the Estate of Fred. D. Booth, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Security or Bail in Error.

Know all men by these presents that the Saint Paul Title Insurance and Trust Company, a corporation organized under the laws of the State of Minnesota, is held and firmly bound unto Georgianna C. Booth, plaintiff in the above-entitled action, in the full and just sum of ten thousand ($10,000) dollars, to be paid to the said Georgianna C. Booth, her heirs, executors, administrators, and assigns; which payment, well and truly to be made, said Saint Paul Title Insurance and Trust Company binds itself and its successors and assigns firmly by these presents.

Sealed with the seal of said corporation and signed by its president and secretary on this 16th day of September, A. D. 1890.

The condition of the above obligation is such that—

Whereas, lately, at a general term of the circuit court of the United States for the district of Minnesota, in a suit pending in said court between the said Georgianna C. Booth, administratrix, and the Northern Pacific Railroad Company, judgment was entered against said Northern Pacific Railroad Company, and the said

71 Northern Pacific Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgement in the aforesaid suit, and a citation directed to the said Booth, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the second Monday of October next:

Now, therefore, if the said Northern Pacific Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its appeal good, then the above obligation to be void; otherwise to remain in full force and virtue.

SAINT PAUL TITLE INSURANCE AND TRUST COMPANY,
By MAURICE AUERBAUGH, *President.*

Attest: C. M. TAYLOR, *Secretary.*

Executed in the presence of—
H. L. DAVIS.
JOHN McKEAN.

(Endorsed:) Filed Sept. 17th, 1890. Oscar B. Hillis, clerk.

72 STATE OF MINNESOTA, } ss:
County of Ramsey, }

Be it known that on this 16th day of September, A. D., 1890, personally appeared before me, a notary public in and for said county

and State, Maurice Auerbach and C. M. Taylor, to me personally known and known to be the same persons described in and who executed the foregoing instrument, and they each acknowledged that they executed the same as the president and secretary, respectively, of said Saint Paul Title Insurance and Trust Company, for and on behalf of said company and as its free act and deed.

[SEAL.] JOHN McKEAN,
Notary Public, Ramsey County, Minnesota.

Approved:
R. R. NELSON, *Judge.*

73 Thereupon, on the 17th day of September, A. D. 1890, the following citation was issued in the words as follows, to wit:

74 UNITED STATES OF AMERICA:

United States Circuit Court, District of Minnesota.

GEORGIANNA C. BOOTH, Administratrix of the Estate of Fred. D. Booth, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To Georgianna C. Booth, adm'x, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Minnesota, wherein the Northern Pacific Railroad Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of Sept., A. D. 1890.

R. R. NELSON, *Judge.*

Due service of the above is hereby admitted by copy.
C. D. & THOS. D. O'BRIEN,
Att'ys of Pl'ff.

75 UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Third Division.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 74 pages, numbered consecutively from one to 74, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said cause and of the whole thereof as appears from the

original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 30th day of September, A. D. 1890.

{ U. S. Circuit Court Seal, Dist. of Minnesota, Third Division. }

OSCAR B. HILLIS, *Clerk.*
By —— ——, *Deputy.*

Endorsed on cover: Case No. 14,377. Minnesota C. C. U. S. No. 947. The Northern Pacific Railroad Company, plaintiff in error, *vs.* Georgianna C. Booth, administratrix of the estate of Fred. D. Booth, deceased. Filed October 23, 1890.

Office Supreme Court U. S.
FILED.
MAR 20 1894
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,

vs.

GEORGIANA C. BOOTH, Administratrix, &c.

No. 327.

In Error to the Circuit Court of the United States for the District of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

Georgiana C. Booth, the mother of Fred. D. Booth, and his administratrix, sued the plaintiff in error for the killing of Fred. D. while he was acting as brakeman of the road. The suit was brought in a State court of Minnesota and claimed five thousand dollars, all that could be recovered in such cases under the laws of that State. The railroad answered, admitting Booth's employment as alleged, but denying that his death was caused by any fault or negligence on its part, and alleging his death was the result solely of his own negligence. (Rec., 1–3.)

The case was removed to the United States Circuit Court, and there tried, and verdict and judgment found and rendered for Mrs. Booth for $5,000—exceptions saved, motions for new trial and in arrest made and overruled, and exceptions noted, and the case brought here on writ of error by the railroad.

The court then is once again confronted with questions of *negligence* and *contributory negligence*, not new questions before this court; indeed, great pains have been taken of recent years to fully post this court on these points.

The exceptions saved (Rec., 15, 25, *et seq.*), bring them up in various shapes, and in truth present the broad query whether the court trying the case should not have directed the jury to find for defendant below.

These subjects are fully discussed in *Everett's case, No. 188*, *Hambly's case, No. 187*, and *Bush's case, No. 198*, at this term, and to our briefs in those cases we beg leave to refer, as it will save time and labor not to repeat or reproduce the authorities in them which apply here, and especially as the two cases last named (187 and 198) are now under advisement.

And the cases used in those briefs sustain the exception of the railroad to the refusal of the instruction (4th) asked by it (Rec., 26), that Booth being an employé of the road must be presumed to have been familiar with the rules of the road, &c. This forms a part of the very risk he assumed in engaging in the employment, as shown by the authorities already referred to in the cases mentioned, and it is a material point in the case, as the evidence shows. And as following that, the court erred, according to the authorities, in refusing to charge, if Booth went in between the cars while in motion for the purpose of uncoupling them in violation of a rule of defendant (the road) known to him, he was guilty of negligence and the verdict must be for the road. (Rec., 26, 3 ins.) This is

direct and undisguised negligence as noted by all the cases.

Bunt's case, 138 U. S., 485, and cases cited;
The St. Louis, &c., v. *Schumacher* (by Mr. Justice Brown, present term, No. 239, March 5, 1894), and cases cited.

This error is patent, and is at the very bottom of the case, there can be no question; it was vital as against the road before the jury.

An exception is expressly noted (Rec., 27, 7th and 8th ins.) to the court's declining to instruct the jury that, at best, only nominal damages could be recovered in the action by Mrs. Booth. This request is based upon the law and its construction in Minnesota, which limits the recovery to the actual pecuniary loss sustained, or to compensatory damages only. (*Hutchins* v. *St. P., M., &c., 46 N. W., 709; Gunderson* v. *N. W. Elevator Co., 49 N. W., 694; Hardy* v. *Minneapolis, &c., 36 Fed. R., 675.*) The Record fails to disclose any pecuniary loss to Mrs. Booth by reason of the death of Fred. D. Booth; and when the road asked the court to tell the jury (Rec., 27) the recovery must be limited to the actual pecuniary injury, and the burden to prove that was upon the plaintiff below, the court erred in refusing to do so.

Then, if we are mistaken in supposing the errors already indicated are not enough to reverse the judgment, the case comes back to the original propositions as claimed in the road's first and second requests, which were denied by the court (Rec., 26), that plaintiff below was guilty of negligence, and the jury should be instructed to find for the road!

The negligence of Booth on the occasion named is clearly made out by the testimony of Hammell, witness for the road, who was closely questioned by the court and it is this (Rec., 18–20):

To support the issues upon its part the defendant introduced E. W. Hammell, who testified, on direct examination, that he was conductor on train No. 17, on which plaintiff's intestate was brakeman at the time he was injured; that it was Booth's second trip with him, and that Booth appeared to be a first-class brakeman; that there was a book of rules kept in the caboose upon the train upon which Booth made the two trips with him; that there was a time-card in the caboose with the book of rules; that the rules were on all time-cards; that he always instructed every one who comes as to the nature of the time-card and the book of rules, and they were habitually consulted by the trainmen on his train, including Booth. Witness further testified that after the first car had been set out and the engine, with the front part of the train, had passed onto the side track, witness pulled the switch to allow the front part of the train to back down on the main track. Booth then signalled to the witness to know whether he should cut the second car off, and witness signalled back not to cut the car off, but to back down the main track; that the cars with the caboose were too near the switch to allow the cars attached to be moved down the side track, the second car to be cut out being 6 or 8 cars nearer the engine than the first which was cut out, and that while the train was backing down the main track plaintiff received the injuries complained of.

The witness further testified as follows:

Q. Is it the duty of a brakeman to cut off a car when ordered by you as conductor?

A. No, sir.

Q. Who directs them?

A. Those who were in my car obey me unless there is anything in the rules tells them not to.

Q. Did you direct the cutting off the cars?

A. I gave the signals.

Q. You signalled him to cut off?

A. I did not. I signalled him not to cut off.

Q. Then, as I understand you, after you gave the signal not to cut off you gave no more signals whatever?

A. I gave no more. I know nothing about whether he obeyed the orders. I know nothing more about it.

The Court: Why did you give no more orders, when you knew it was necessary to cut off the other car—cut off the two cars and then back down? You went in for orders before you cut off the other car.

A. I supposed when they had shoved the train clear across they would go and cut off the car.

Q. You knew it was necessary to cut off the two cars and you had cut off the one. Why did you go in for orders when you knew?

A. We do that right along.

Q. Did Booth know the two cars were to be set off?

A. Yes, sir.

Q. And one had been cut off?

A. Yes, sir.

Mr. Bullitt:

Q. Where was Booth standing when he gave you the signal?

A. It would be a pretty hard matter for me to say. I should judge it was the second or third car.

Q. Standing on top of the car?

A. Yes, sir.

A Juror: Did you give Booth the order to cut off the two cars?

A. No; I don't think I did.

After reading this statement in connection with the rest of the Record in the case, it must be as true here as in *The St. Louis, &c.* v. *Schumacher* (*supra*), that "giving to his own conduct, as well as that of the defendant, the construction most favorable to the plaintiff, there was no theory upon which it was proper to submit the case to the jury."

The decision in the *Schumacher case* standing, reversal of this is inevitable. In this, as in the *Schumacher case*, no evidence of a willful or intentional negligence on the part of the road to injure Booth was produced, and no such intention was averred in the complaint, and to sustain this judgment the court must make railroads insurers of the lives of their employés, and nothing less. (*Railroad Co.* v. *Jones*, *95 U. S.*, *439*.)

Respectfully,

JAMES MCNAUGHT,
A. H. GARLAND,
H. J. MAY,
For Plaintiff in Error.

FILED.
MAR 27 1894
JAMES H. McKENNEY,
CLERK

327

327

RECORD CASE, NO. 14,357.

BRIEF FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGIANNA C. BOOTH, ADMINISTRATRIX OF THE ESTATE OF FRED D. BOOTH, DECEASED, DFENDANT IN ERROR.

RECORD CASE. NO. 14,377.

BRIEF FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

THE NORTHERN PACIFIC RAILDROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGIANNA C. BOOTH, ADMINSTRATRIX OF THE ESTATE OF FRED D. BOOTH, DECEASED, DEFENDANT IN ERROR.

This action is allowed in the State of Minnesota under Gen. Sts., 1878, Chap. 78, Sec. 2, as follows:

"When death is caused by the wrongful act or omission of any party, the personal representatives of the deceased may maintain an action if he might have maintained an action, had he lived, for an injury caused by the same act or omission; but the action shall be commenced within two years after the act or omission, by which the death was caused; the damages thereon cannot exceed five thousand dollars, and the amount recovered is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportions as the personal property of the deceased person."

I.

The writ of error should be dismissed upon the ground that the judgment was for $5,000 and costs (page 12) which amount is not sufficient to confer jurisdiction upon this court.

Walker, v. U. S. 4. Wall, 163;

Western Union Telegraph Co., v. Rogers, 93. v. U. S. 565;

At common law judgment did not bear interest.

Perkins, 2 Fourniquet, 14, How, 328;

Freeman on Judgments, 2nd Ed., Sec., 441;

Section 966, Revised Statutes, only allows interest from date of entry of judgment.

The *exparte* action of the plaintiff in error, therefore, in procuring the amendment of the judgment, (page 14) so as to add interest, 116.73, was taken for the sole purpose of conferring jurisdiction upon this court and is ineffectual.

Gurner, v. U.S. 11, How, 162;

The Lucy, 8, Wall, 307.

II.

The Court instructed the jury that if the plaintiff was entitled to recover, the damages were confined to the pecuniary loss sustained by reason of the death of plaintiff's intestate.

This instruction was certainly correct:

Railroad Co. v. *Banon*, 5 Wall. 90;

Thompson on Negligence, pp, 1289–90–91;

and is the construction placed upon the statute of Minnesota by the Supreme Court of that state:

Hutchins v. *Railroad*, 44 Minn. 5.

It seems unnecessary to argue that where, under proper instructions a verdict has been rendered by a jury and afterwards considered and sustained by the trial Court upon a motion for a new trial, this Court will not attempt to say just what amount would be a proper verdict, particularly when only a short summary of the evidence appears in the record.

III.

The charge given by the Court upon the question of contributory negligence was correct. Nor does the record show that the defendant was guilty of contributory negligence:

Thompson on Negligence, p. 1019;

Wilson v. *Railroad*, 37 Minn. 326.

It is respectfully submitted that the judgment should be affirmed.

C. D. O'BRIEN,

Counsel for Defendant in Error.